80-1302

No.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EARL DAVID SHAFFER,

Petitioner,

vs.

DAVID M. COOK, Oklahoma County District Judge, LARRY D. LAHMAN, and STEPHEN JONES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO REVIEW DECISION BY UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

EARL DAVID SHAFFER, *Petitioner*
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QUESTIONS FOR REVIEW

The record of this case reflects numerous Judicial acts of prejudice, abuse of discretion, and dishonest intent by Judge DAVID M. COOK. The other respondents aided in these corrupt and conspiratorial acts. This being the case —, there were several basic laws violated and disregarded by the courts below with the main question briefly stated as follows:

1. Does the Constitution provide this petitioner the right to a fair and impartial trial?

2. Was Judge DAVID M. COOK disqualified by reason of having prejudice? Was he disqualified by fact and law?

3. The Oklahoma Case law states that when the records "create doubts as to the trial judge's freedom from prejudice" that he is "disqualified", and "was without judicial power or authority to make an order..." When this judge refused to disqualify himself did he usurp jurisdiction not granted by law and in obvious violation of his oath and the Constitution?

4. The United States Court of Appeals, Tenth Circuit decision dishonestly states "No allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his Court." This petitioner's complaint has several allegations stating the corrupt abuses by respondent Cook in his Court. Part of petitioner's allegations states "DAVID M. COOK was without judicial power or authority and did not have jurisdiction to proceed in said case. That a basic part of his duty is to be in fact fair and impartial. That it was his duty to disqualify himself and he should have disqualified himself because of his bias and prejudiced attitude, but totally refused when requested by plaintiff. That he proceeded and continued to conspire against plaintiff when he knew he had no jurisdiction to make decisions due to his bias and prejudice." Does petitioner's complaint contain allegations and a basis for relief?

5. Did Judge DAVID M. COOK wilfully abuse his power and office in an unlawful manner by disregarding numerous laws —, allowing false entry into the record as to conspiracy, and usurping jurisdiction in a manner not created by and in violation of the law?

6. Will this petitioner be denied his right to equal protection and due process of the Constitution and Oklahoma Case law relating to bias and prejudice which disqualified Judge DAVID M. COOK from having jurisdiction?

7. The Case law cited in item 6 below describes the spirit and intent that Judge DAVID M. COOK had no jurisdiction and "ceased to be a judge" and for such "corrupt motives"... "can not afford him any protection." Further, "if the court had no jurisdiction of the case and the judge who was presiding knew of the facts, he is liable in this action." Does this United States Supreme Court intend to enforce the Constitution and the spirit and intent of the Case law against such an obviously corrupt, unlawful, and wilful abuse of a court by the respondents? Therefore, to also enforce that respondents are liable for their unlawful acts?

8. Does this United States Supreme Court intend to enforce the Constitution or become another Court which is a party to the unlawful protection and cover-up of corrupt and dishonest lawyers and judges?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

EARL DAVID SHAFFER,

Petitioner,

vs.

DAVID M. COOK, Oklahoma County District Judge, LARRY D. LAHMAN, and STEPHEN JONES,

Respondents.

Petitioner hereby prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals, Tenth Circuit, decision which carte blanche violates the Constitution, and laws as set forth herein. To review and remand that respondents have violated the law and should be tried by a jury as to their conspiracy and unlawful acts being questions of fact.

OPINION BELOW

This case was assigned to Number 79-2201 by the Tenth Circuit Court of Appeals. This case has not been assigned a citation.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254. That specifically the United States Constitutional provisions of fair and impartial trial, equal protection and due process clauses, and numerous other laws were violated and should be enforced by redress. The Tenth Circuit decision was dated November 5, 1980.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. STATE ex rel LARCEY v. SULLIVAN et al, 207 OK 1.128, 248 P.2d 239, 240, 244, at Page 240:

Syllabus by the Court

1. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge.
2. It is the duty of courts to scrupulously guard the right of a litigant to impartiality of a judge and a judge should refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question.
4. *Record examined and held sufficient to create doubts as to to the trial judge's freedom from prejudice against relator,* notwithstanding the fact that he believes himself to be unprejudiced, and held further that record discloses that *the trial judge was, under the circumstances, disqualified to preside as a judge in the case and by reason thereof, was without judicial power or authority to make an order* appointing a receiver over all the property of the petitioner (defendant) or to order the payment of an additional sum of $500 for plaintiff's attorney fee, or to perform any further judicial functions in the cause except to certify his disqualification to further preside in the case.

Page 244:

"2. In Heard v. Sullivan, Judge, supra, we said that where there are circumstances of such a nature as to cause doubts as to a judge's partiality, bias or prejudice, it is his duty to disqualify, notwithstanding the fact that he personally believes himself to be unprejudiced, unbiased and impartial."

2. BLEVINS v. MORLEDGE et al, 5 Okl. 141, 47 P.1068 at 1069 states:

"Authority to hear and determine a cause is constantly interpreted as the equivalent of jurisdiction."

3. STATE ex rel. BINGHAM v. HOME BREWING CO. OF INDIANAPOLIS, 105 N.E. 909 at 917 states:

"Authority" means control over, jurisdiction, absolute power."

4. HEARN et al v. MILLER, District Judge, Oklahoma Case Cite, 33 P.2d 506 and 507:

Syllabus by the Court

2. Statements made by a judge concerning one who is then or thereafter becomes a party to an action in his court which statements are made at great length and in detail and indicate deep feeling of bias or prejudice, are sufficient to disqualify the judge to sit and preside over the trial of a cause in which such person is a party.

at 507

"yet the question is not so much whether he feels and insists that he would be able to give a fair and impartial trial, as *it is to whether his utterances and actions have been such as to preclude reasonable men from feeling that a fair and impartial trial, without bias or prejudice, could be had before him.*"

Further, at 507 states:

"a judge who has theretofore in an extended public statement made such forceful criticism of the party as to indicate a sincere bias or deep-seated prejudice. Where this has been done the judge should not in justice to the litigant sit in the trial of his case." London v. Ogden, supra.

5. TEGLER v. STATE, Oklahoma Case Cite 130 P. 1164 at 1167:

"The words "prejudice" and "impartial" have no narrow, technical meaning in a legal sense, but are words commonly used in the everyday affairs of life, and their meaning is well understood by all persons of ordinary intelligence. Webster's New International Dictionary defines "Prejudice" as "an opinion or judgment formed beforehand, or *without due examination; a prejudgment.*"

"Prejudice" is prepossession; judgment formed beforehand without examination."

6. BRADLEY v. FISHER, 13 Wall. 335, 20 L. Ed. 646 (1872) at 647 states:

Second. *If the court had no jurisdiction of the case, and the judge who was presiding knew of the facts, he is liable in this action,* although he did not act corruptly or maliciously. Houlden v. Smith. 14 Q.B. 841.

Harvie v. Cammack, 6 Dana, 243. *"It must not be arbitrary, vague and fanciful."* Rex v. Wilkes, 4 Burr. 2539; Witman v. Ely, 4 Serg & R 265.

"If this discretion be wilfully abused, it is criminal." Rex v. Young, 1 Burr. 563.

"A judge or any person acting by authority as such, where he has over the subject matter and over the person, a general jurisdiction which he has not exceeded, will not be liable to have his judgment examined in an action brought against him, but *if the jurisdiction be wanting over the subject matter and over the person, such judgment would be examinable."*

at 648 states:

"before the court can acquire jurisdiction to adjudicate; and that *jurisdiction is limited to the exercise of a legal discretion by a court, and does not include the arbitrary acts of a judge.*

"The question in every case to be determined is, *was the act done a judicial act, done within his jurisdiction?* If it was not, he can claim no immunity or exemption by virtue of his office from liability as a trespasser; "for if he has acted without jurisdiction, he has ceased to be a judge." See Randell v. Brigham, 7 Wall. 523, 19 L. ed. 285.

"But if, *from malicious and corrupt motives, he usurped jurisdiction knowingly, the fact that he claimed to be acting as a court, and acted erroneously cannot afford him protection."* Yates v. Lansing, 9 Johns 407-413, 432.

"3. *Wilful abuse of power, corrupt exercise of office, express malice towards an individual and working intentional injury to him by means of false entries made by a judge on the records of a court of general jurisdiction, are not judicial*

acts and are not within the discretion of the judge; and satisfactory proof of these facts is admissible in evidence in actions to usurp the wrong done by such acts; to show that, in the particular case, *the judge attempted to create for himself a jurisdiction and discretion not given by the law."*

at 651 states:

"A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where there is clearly no jurisdiction over 352*) *the subject matter, any authority exercised is usurped authority, and for the exercise of such authority, *when the want of jurisdiction is known to the judge, no excuse is permissible."*

7. 72 C.J.S. 480, 481 states in part:

PREJUDICE:

"....formed without proper grounds or before suitable knowledge; an opinion or judgment formed beforehand, or without due examination;..."

"..."Prejudice" also means to the injury or detriment of another; but it is only detriment resulting from unfair judgment which constitutes legal prejudice."

"As a verb, the word "prejudice" is defined as meaning to injure or damage by some judgment or action; to cause injury to; hence, generally to hurt; damage; injure, impair; to cause any harm or damage or loss to; to bias the mind by hasty and incorrect notions, and *give it an unreasonable bent to one side or other of a cause;* to prepossess with unexamined opinions, or opinions formed without due knowledge of the facts and circumstances attending the question."

"Prejudice: as a noun has been held synonymous with "Prejudgment" see ante note 50, and has been distinguished from "bias" see 10 C.J.S. p.354 note 72; and *as a verb has been held substantially similar to "defraud"* see 26 C.J.S. p.683 note 12.1."

"In law, prejudice is a bias on the part of the judge, jury, or witness, which interferes with fairness of judgment."

STATEMENT OF CASE

This petitioner originally filed a civil lawsuit for Legal Malpractice and Conspiracy against the one respondent named herein Stephen Jones. This case was filed in the Oklahoma County District Court on October 26, 1976. This original case was assigned the Number CJ-76-3316. The respondent DAVID M. COOK was assigned this case CJ-76-3316 as a District Judge. The remaining respondent LARRY D. LAHMAN was an attorney representing the defendant Stephen Jones in Case CJ-76-3316. This case came for hearing on several occasions before respondent DAVID M. COOK.

This petitioner was unable to find an attorney to represent him in the aforesaid case. He therefore appeared Pro Se before DAVID M. COOK each and every occasion his interests were represented.

That these appearances before Judge DAVID M. COOK subjected this petitioner to numerous prejudicial and unlawful acts of conduct that were intentional intimidation of petitioner. Respondent Judge DAVID M. COOK maintained a complete attitude that is exemplified by the following statement which he directed to this petitioner during a court hearing on February 18, 1977. That statement was:

"I can't dismiss this case with prejudice, but I wish I could." This comment is among several other prejudicial remarks which respondent COOK has directed to this petitioner. That his acts which followed this statement verified this was what he ultimately intended to accomplish, and did accomplish in a conspiratorial and fraudulent manner.

The acts of prejudice which were committed by respondent Judge DAVID M. COOK included utterances, facial expressions, mannerisms, and several orders that were contrary to the law and facts. The record is very full of these intentional acts which were wrongfully committed by respondent COOK. There is no doubt that respondent COOK is prejudiced.

Among these numerous acts of prejudice which the record reflects are the following:

1. An order signed on April 22, 1977 falsely stating there was no evidence in the record concerning this petitioner's alleged conspiracy. The record of Case CJ-76-3316 in fact contained a sworn to petition and answers to interrogatories which this petitioner had signed stating circumstances of the allegation of a conspiracy.
2. An unlawful order signed on October 28, 1977 intimidating this petitioner (plaintiff, Case CJ-76-3316) "to retain counsel or in the alternative he would dismiss this action" of Case CJ-76-3316. This is a very basic violation of this petitioner's Constitutional rights and, particularly, Title 28 U.S.C. § 1654.
3. The respondent COOK was requested to disqualify himself both orally in open court and by written motions. That he arrogantly refused and denied the written motions on November 2, 1979 and November 9, 1979. Then this petitioner was basically kicked out of court by respondent COOK granting carte blanche Summary Judgment to all allegations. Thus, COOK accomplished his earlier attitude to dismiss the case. This was ultimately the result of an unlawful conspiracy to protect and cover up the dishonest acts of the respondent attorney Stephen Jones.

This petitioner having been the victim of several acts of fraud and conspiracy which respondents committed, filed a federal lawsuit. This lawsuit alleged numerous acts by which he had become a victim. The acts which were committed by respondents come under the Civil Rights Statutes Title 42 U.S.C. 1983, 1985 and 1986. The complaint was filed in the United States District Court, Western District, of Oklahoma. This complaint was assigned the Number CIV-79-805E. After an adverse ruling to the complaint this petitioner appealed the case to the Tenth Circuit Court of Appeals. The case was then Numbered 79-2201. The Tenth Circuit Court of Appeals has disregarded all the law that this petitioner presented and ruled on November 5, 1980 that respondent DAVID M. COOK had jurisdiction. This being a very clear ruling that allows a judge to violate the law to the Nth degree which was never intended by any respectable decision.

Thus, the United States Court of Appeals for the Tenth Circuit has failed to perform their duty and enforce the Constitution and law. This has caused the need for this petition for Writ of

Certiorari and demonstrates the reason why Judge COOK felt he could be so corrupt. This is the reason he continued to sign orders when he was without jurisdiction and signed an order on March 21, 1980. This prejudicial order granted Summary Judgment against this petitioner after the case was stated to be at issue.

ARGUMENT FOR ALLOWING WRIT

This case is a direct result of the corruption and dishonesty that permeates the entire judicial system in Oklahoma. That system has operated to successfully protect and cover up the dishonesty of lawyers and judges. The respondent Judge DAVID M. COOK was acting as part of this cover-up system. His acts in this case were intentionally corrupt with the motive to protect and cover up the dishonesty of fellow lawyers. This case was originally filed because of the numerous unlawful acts committed by Judge COOK operating jointly with other respondent lawyers to achieve their protection and cover-up. This situation is so out of control that it has criminal and fraudulent intent against the citizens.

The record of this instant case shows there was an unlawful intent. Because of this intent, Judge COOK has abused his power and discretion, made false entry into the record, and usurped jurisdiction in a prejudicial manner not given by law. Further, these corrupt acts are such violations of the law that he (Cook) "ceased to be a judge." The record reflects "corrupt motives" that are even more serious than prejudice, which disqualified Judge COOK. He (Judge Cook) was disqualified by reason of prejudice and was without jurisdiction or authority over Case CJ-76-3316. He is part of the protection cover-up scheme in Oklahoma.

The cited law herein does not protect a judge who so wilfully abuses his power. He (Judge Cook) ceased to be acting as a judge and is not immune for the acts that are "not judicial" and "not within the discretion" which violate the law. Because of the "corrupt motives" he "usurped jurisdiction and discretion not given by the law." The facts and law do not give any of the respondents the shield or protection of immunity. Therefore, all of the respondents are "liable" for their acts which petitioner alleges. The allegations of conspiracy and fraud are questions of fact to be tried by jury.

The appellate jurisdiction of this court is the result of a basic Constitutional right. That right involves appearing before a judge that is not prejudiced. Not to even re-argue the aforesaid unlawful acts. The United States Court of Appeals for the Tenth Circuit has disregarded the cited law to enforce this fundamental right. This right must be enforced and is not their discretion to allow a judge to violate this Constitutional clause. Justice has been defeated.

This court should allow a Writ of Certiorari in order to reverse, vacate, set aside and hold for naught the orders of Judge DAVID M. COOK and the UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT. This case should then be remanded to the U.S. FEDERAL DISTRICT COURT OF OKLAHOMA with instructions that Judge DAVID M. COOK was disqualified and without jurisdiction. Further, that Judge DAVID M. COOK and the other defendants are without the protection of judicial immunity for the acts which they committed, and are questions of fact triable by jury.

CERTIFICATE OF SERVICE

This is to certify that on this 31st day of January, 1981 a true and correct copy of the foregoing petition was mailed, postage prepaid, to: James Sears Bryant, P.O. Box 1844, Enid, Okla. 73701; Elliott C. Fenton, P.O. Box 1638, Okla. City, Okla. 73101; and Jan Eric Cartwright, Attorney General, 112 State Capitol Bldg., Okla. City, Okla. 73105, attorneys for the respondents. Certified return receipts Nos. 047458, 047464, 047465, respectively.

Earl David Shaffer

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED NOV. 05 1980

EARL DAVID SHAFFER, Plaintiff-Appellant, v. DAVID M. COOK, LARRY D. LAHMAN, and STEPHEN JONES, Defendants-Appellees	)	No. 79-2201

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. 79-0805)

Submitted on the briefs pursuant to Tenth Circuit Rule 9:

Earl David Shaffer, Pro Se.

Jan Eric Cartwright, Attorney General, and Manville T. Buford, Assistant Attorney General, the State of Oklahoma, Oklahoma City, Oklahoma, for Defendant-Appellee David M. Cook; Elliott C. Fenton of Fenton, Fenton, Smith, Reneau & Moon, Oklahoma City, Oklahoma, for Defendant-Appellee Larry D. Lahman; and James Sears Bryant, Enid, Oklahoma, for Defendant-Appellee Stephen Jones.

Before BARRETT, McKAY and LOGAN, Circuit Judges.

PER CURIAM.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

This is an appeal from an order of the district court dismissing appellant's complaint pursuant to Fed. R. Civ. P. 12(b) (6). The complaint was brought pursuant to 42 U.S.C. § § 1983, 1985 and 1986, alleging violation of the appellant's civil rights. It alleged that appellee Cook (an Oklahoma state trial judge) and appellees Jones and Lahman (attorneys who were involved in a state case brought by appellant and dismissed by appellee Cook) conspired to deprive appellant of his civil rights, specifically a fair trial.

No allegation of the complaint indicates that appellee, Judge Cook, acted outside the scope of the jurisdiction of his court. Thus, he is absolutely immune from liability for his judicial acts. Stump v. Sparkman, 435 U.S. 349 (1978).

As to the claim against the two attorneys, the district court, in dismissing the action against them, concluded that "a private person who is alleged to have conspired with a state district judge who is entitled to immunity cannot be held liable..." While we agree that the conspiracy element of appellant's claim, *see* Adickes v. S.H. Kress and Co., 398 U.S. 144, 150 (1970), would not be fulfilled even if appellant's allegations were true, we have recently held that the immunity of a state official will not necessarily protect a private individual alleged to have conspired with him. Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980). The test laid out in *Norton* to determine whether a private individual has actively conspired with an immune state official is as follows:

> It is our view that the critical inquiry in making this determination is: Has the plaintiff demonstrated the existence of a significant nexus or entanglement between the absolutely immune State official and the private party in relation to the steps taken by each to fulfill the objects of their conspiracy? The resolution of such issues must, of necessity, be made on a case-to-case basis.

620 F.2d at 1380.

Appellant's only allegation supporting his conspiracy theory against the attorneys is that he saw one of them speak with the judge in the courthouse before each hearing. The complaint thus concludes that that attorney, and the other by association apparently, had defrauded him in a conspiracy with the court. Nothing in the complaint indicates that the court or the attorneys were acting outside the confines of the neutral function of a judicial forum. There is no cause of action under the Civil Rights Act in this case where the state did no more than furnish a forum to private parties and had no interest in the outcome. *See* Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326 (10th Cir. 1978). We have stated before that "[l]awyers do not act under color of state law solely by engaging in private litigation on behalf of their clients." Brown v. Chaffee, 612 F.2d 497, 501 (10th Cir. 1979). Appellant's amended complaint fails to allege the kind of conspiratorial nexus between Judge Cook and the attorneys contemplated in *Norton* that would support a cognizable § 1983 or § 1985 non-immune conspiracy intended to deprive appellant of his constitutional rights. The *pro se* complaint was thus properly dismissed. [1] *See* Estelle v. Gamble, 429 U.S. 97, 107 (1976).

Accordingly, the judgment of the district court is affirmed. The mandate shall issue forthwith.

---

1. Appellant's § 1985 and § 1986 claims were also properly dismissed due to appellant's failure to allege any "invidiously discriminatory motivation" of appellees. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (§ 1985); Hahn v. Sargent, 523 F.2d 461, 469-70 (1st Cir. 1976), *cert. denied*, 425 U.S. 904 (1976) (§ 1986 claim is dependent upon successful § 1985 claim).

PUBLISH

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED SEPT. 19, 1979

EARL DAVID SHAFFER,)
Plaintiff,)
v.)
No. CIV-79-805-E
DAVID M. COOK,)
Defendant,)
LARRY D. LAHMAN,)
Additional Defendant,)
and
STEPHEN S. JONES)
Additional Defendant,)

ORDER

Earl David Shaffer, the plaintiff herein, has filed a motion for disqualification of the assigned trial judge in the present case and has accompanied said motion with his affidavit pursuant to 28 U.S.C. § 144.

The affidavit provides:

> "Plaintiff, EARL DAVID SHAFFER, being first duly sworn, states under oath, that he is the Plaintiff in the above entitled claim; that the affiant has reason to believe, and does in fact believe that he cannot have a fair and impartial trial before the Honorable Luther Eubanks, judge in the above styled matter, by reason of bias and prejudice of said Honorable Luther Eubanks."

The plaintiff is correct in asserting in his "statement of facts" which was attached to the motion that a court, in considering a motion to recuse under § 144, must accept all facts stated in the affidavit as being true. See Bell v. Chandler, 569 F.2d 556 (10th Cir. 1978); United States v. Ritter, 540 F. 2d 459 (10th Cir. 1976).

The difficulty with the affidavit presented by plaintiff, however, is that it contains no facts which must be taken as true, but merely make conclusory assertions. As such, it is legally and fatally insufficient. See Knoll v. Socony Mobil Oil Company, 369 F.2d 425 (10th Cir. 1966), cert. denied, 386 U.S. 977 (1967); United States v. Bennett, 539 F.2d 45 (10th Cir. 1976), cert. denied, 429 U.S. 925 (1976).

Accordingly,

IT IS ORDERED that plaintiff's motion to disqualify the assigned trial judge be and the same is hereby denied.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 19 day of September, 1979.

LUTHER B. EUBANKS

United States District Judge